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In the Supreme Court of the United States

OCTOBER TERM, 1997

ARIADNE FINANCIAL SERVICES PTY. LTD. AND MEMVALE PTY. LTD., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners knew or should have known that they had been damaged by the government's alleged breach of contract more than six years before they filed their claim, thus placing this action outside the limitations period in 28 U.S.C. 2501.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 133 F.3d 874. The opinion and order of the Court of Federal Claims (Pet. App. 11a-44a) is reported at 37 Fed. Cl. 174.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1998. A petition for rehearing was denied on March 17, 1998. Pet App. 45a-46a. The petition for a writ of certiorari was filed on June 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case is one of the more than 100 suits that have been filed in the Court of Federal Claims (CFC) since 1991 in which thrift institutions, their shareholders, and their holding companies have alleged breaches of contract by the government as a result of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. In each case, the plaintiffs have alleged that, during the 1980s and prior to FIRREA, the government agreed to relax certain regulatory capital requirements—particularly by permitting "supervisory goodwill" to be counted as an asset in computing capital—in order to encourage the acquisition of various failing savings and loan institutions. Plaintiffs in each case have alleged that the imposition of FIRREA's new capital requirements—which precluded the use of supervisory goodwill to satisfy regulatory capital requirements—breached those agreements. In *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), this Court addressed the first three of the "goodwill" cases. In each case, the Court found no cause to question the lower courts' determination that there were enforceable contracts between the government and the thrift institutions, and that the government was liable for breach.

2. FIRREA was enacted on August 9, 1989. As indicated above, it adopted minimum capital requirements that prohibited the use of supervisory goodwill to satisfy regulatory capital requirements. See 12 U.S.C. 1464(t)(1)-(2). The Act instructed the Director of the newly created Office of Thrift Supervision (OTS) to promulgate regulations, *ibid.*, and provided that he could grant limited exceptions to the capital standards required by the Act. 12 U.S.C. 1464(t)(6)-(8).

On November 8, 1989, OTS published interim final regulations, effective December 7, 1989, implementing FIRREA's capital requirements. See 54 Fed. Reg. 46,845 (to be codified at 12 C.F.R. pts. 51, 563, 567). In addition, on January 9, 1990, OTS issued a "Thrift Bulletin" emphasizing that the new regulations applied to thrifts that had been "operating under previously granted capital and accounting forbearances." OTS Thrift Bulletin No. 38-2, *Capital Adequacy: Guidance on the Status of Capital and Accounting Forbearances and Capital Instruments Held by a Deposit Insurance Fund.* (Jan. 9, 1990).

3. In April 1987, petitioners entered into a series of transactions through which they purchased the Southern California Savings & Loan (SoCal) from government receivership. Pet. App. 4a. Petitioners alleged that they had a contractual relationship with the government at the time of the purchase that encouraged the conversion of SoCal from mutual to stock form and petitioners' acquisition of stock resulting from the conversion. Petitioners contended that the government agreed to permit treatment of supervisory goodwill and "capital credits"[1] as capital assets in computing regulatory capital, with supervisory goodwill to be amortized over 25 years. Pet. App. 4a.

4. Petitioners commenced this action on April 16, 1996. On September 9, 1996, the government filed motions in the CFC to dismiss this and 25 other *Winstar*-related cases, on the ground that they were barred by the six-year statute of limitations in 28 U.S.C. 2501, because they accrued on the date FIRREA was enacted (August 9,

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[1] Capital credits are cash assistance provided by the Federal Savings and Loan Insurance Corporation (FSLIC) to facilitate a transaction.

1989) and were filed more than six years after that date. The government further argued that, even if the claims were deemed to have first accrued only when FIRREA's implementing regulations became effective—December 7, 1989—this case and one other (*Shane v. United States*, No. 96-108C)—would still be time-barred. The CFC rejected the former argument, but adopted the latter.

The CFC held that "a claim first accrues, within the meaning of section 2501, 'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action,' and 'the plaintiff was or should have been aware of their existence.'" Pet. App. 20a. The CFC rejected the government's argument that the claims accrued when FIRREA was enacted, reasoning that such "enactment constituted a breach that was solely anticipatory." *Id.* at 25a. The CFC held that the paragraph of FIRREA setting forth new capital standards was not self-executing, but depended upon instructions to the OTS Director to promulgate final regulations within 90 days, to become effective within 120 days of FIRREA's enactment. *Id.* at 26a. The CFC concluded that "FIRREA was essentially a legally binding forecast of a future breach of the forbearance agreements," and that there was no effective breach until the regulations required by the statute and issued by the OTS Director became effective. *Id.* at 27a. Thus, the CFC declined to dismiss the suits of 24 savings and loans institutions that were filed less than 6 years after the OTS regulations became effective. *Id.* at 28a.

At the same time, the CFC rejected petitioners' argument that no breach occurred until OTS acted against them individually. Rather, it held that the claims accrued when FIRREA's implementing regulations became effective because "[o]nce the OTS regulations took effect, thrifts were legally subject to new capital standards that

were in direct contradiction to the terms of their forbearance agreements." Pet. App. 30a. The CFC also rejected petitioners' argument that their claims did not ripen until they pursued the exceptions available under FIRREA. *Id.* at 33a-34a. The CFC noted that the potential availability to petitioners of mitigation of their damages through FIRREA's exceptions did not change the effective date of the breach of the contract. "The existence of the breach itself, not the degree of harm caused by the breach, is the essential component of [petitioners'] claims. Because the exceptions could not negate the initial harm of the breach itself, [petitioners'] claims were ripe regardless of whether they pursued FIRREA's exceptions." *Id.* at 35a (footnote omitted). Accordingly, the CFC dismissed petitioners' case and the *Shane* case, both of which were filed more than six years after the effective date of the OTS regulations.[2] *Id.* at 44a.

5. The court of appeals affirmed the dismissal of petitioners' case.[3] The court concluded that the CFC did not err in determining that petitioners should have known that they had lost the asset of supervisory goodwill prior to April 16, 1990, and that therefore their claim accrued

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[2] The CFC also rejected three other arguments that petitioners made in support of their contention that their claims did not accrue until individualized agency action was taken against them. See Pet. App. 36a-44a. Those three arguments were: (1) their claims had not "stabilized" until individualized agency action was taken, see *United States* v. *Dickinson*, 331 U.S. 745 (1947); (2) their causes of action constitute continuing claims and postponed accrual until the final breach of the government's continuing duty—when OTS acted directly against them; and (3) the government should be judicially estopped from making its arguments because they were inconsistent with previous positions taken by the government in other litigation.

[3] The appeal in *Shane* is still pending. *Shane* v. *United States*, 37 Fed. Cl. 174 (Fed. Cl. 1997), *appeal docketed*, No. 97-5056 (Fed. Cir. Mar. 17, 1997).

prior to that date—the cut-off date under the statute of limitations. See Pet. App. 6a-7a. The court held that "[t]he government's liability was fixed when it refused to allow the use of the asset [i.e., supervisory goodwill] as it had promised." *Id.* at 9a. The court noted that before April 16, 1990, the statutory prohibition against use of supervisory goodwill had been enacted and OTS had issued regulations enforcing that prohibition. *Ibid.* Moreover, before the critical April 16, 1990, date, OTS had ordered "'[a]ll savings associations presently operating with these forbearances * * * [to] eliminate them in determining whether or not they comply with the new minimum regulatory capital standards.'" Pet. App. 9a.

The court of appeals found it unnecessary to determine "precisely which act constituted the government's repudiation of its contract obligations." Pet. App. 9a. It was sufficient for the court to determine that SoCal was so "convinced that supervisory goodwill was no longer available to it as an asset by March 2, 1990," that it submitted a capital restoration plan to OTS on that date to attempt to come into compliance with regulatory capital requirements without the supervisory goodwill asset. *Id.* at 10a. Thus, by March 2, 1990, at the latest, petitioners "knew or should have known that SoCal had lost [its] asset." *Ibid.* Since petitioners filed suit more that six years after that date, their suit was barred by the statute of limitations.[4] *Ibid.*

ARGUMENT

The fact-bound decision of the court of appeals is correct and does not conflict with any decision of this

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[4] The court of appeals—like the CFC, see note 2, *supra*—rejected petitioners' arguments based on the stabilization and continuing claims doctrines. See Pet. App. 7a-8a. Petitioners do not renew those arguments in this Court.

Court or any other court of appeals. Further review is not warranted.

1. Petitioners misconceive the court of appeals' decision. They contend (Pet. 8-9) that the Federal Circuit erred by holding that the period of limitations commenced when they were on notice that the government *intended* to breach the alleged goodwill agreement. In fact, however, the court of appeals repeatedly stated that the period of limitations began no later than the date on which petitioners knew or should have known that the alleged breach had *already occurred* and had *already resulted in a deprivation* of rights conferred by the alleged agreement.

Stating the rule governing this case, the court of appeals held that petitioners' "breach of contract claim accrued when [they] should have known that [they] *had been damaged by the government's breach*." Pet. App. 6a (emphasis added). The court concluded that the CFC had not erred in determining that petitioners "should have known that [they] had lost the asset prior to April 16, 1990." *Id.* at 7a. The court of appeals reasoned that "[t]he government's liability was fixed when it refused to allow use of the asset as it had promised." *Id.* at 9a. The court determined that that refusal was clear before the critical date of April 16, 1990, because prior to that date the government had enacted a statutory prohibition on the use of supervisory goodwill, had issued regulations enforcing that prohibition, and had "issued a notice of intent to apply these regulations to thrifts, including SoCal." *Ibid.*

The court of appeals stated that it "need not determine today precisely which act constituted the government's repudiation of its contract obligations," Pet. App. 9a, because it was clear that by March 2, 1990, SoCal was sufficiently convinced that supervisory goodwill was no

longer available that it "submitted to OTS a capital restoration plan designed to bring [it] into compliance with regulatory capital requirements without the supervisory goodwill asset." *Id.* at 10a. Thus, the court of appeals concluded that by that time, petitioners "knew or should have known that SoCal *had lost this asset*," *ibid.* (emphasis added), and, hence, the statute of limitations period had commenced. *Ibid.*

2. The court of appeals was correct in characterizing the events preceding March 2, 1990, as constituting not merely the manifestation of an intention to repudiate the alleged contract, as petitioners contend (Pet. 8-10), but an actual breach of the alleged contract. If the government indeed promised to permit SoCal to utilize supervisory goodwill as alleged, that promise was abrogated by FIRREA. In addition, prior to the statute of limitations cut-off date, the government had issued the regulations mandated by FIRREA, OTS had issued a notice that it intended to apply the regulations to thrifts such as SoCal, and SoCal had evidenced knowledge that supervisory goodwill was no longer available to it by submitting a capital restoration plan to OTS.

FIRREA instructed the Director of the Office of Thrift Supervision to prescribe capital standards in the regulations, including a leverage limit, tangible capital requirement, and risk-based capital requirement. 12 U.S.C. 1464(t)(1)(i)-(iii). FIRREA *mandated* that the leverage limit include a core capital requirement of at least three percent of the institution's total assets and that the minimum *tangible* capital requirement be at least 1.5 percent of the institution's total assets. 12 U.S.C. 1464(t)(2)(A)-(B). FIRREA also provided a definition of "core capital" (which is applicable "[u]nless the Director [of OTS] prescribes a more stringent definition"), 12 U.S.C. 1464(t)(9)(A), of "tangible capital," 12 U.S.C.

1464(t)(9)(C), and of "qualifying supervisory goodwill," 12 U.S.C. 1464(t)(9)(B). According to those definitions, goodwill is not included in "tangible capital" at all. For periods before January 1, 1995, FIRREA did provide a "transition rule" permitting "qualifying supervisory goodwill" to be included in calculating core capital, but it also limited "qualifying supervisory goodwill" to supervisory goodwill that is amortized on a straight line basis over no more than 20 years, and it permitted such goodwill to be included only within the limits of a descending scale of percentages of total assets, the highest of which is 1.5 percent of total assets. 12 U.S.C. 1464(t)(3)(A). Thus, FIRREA precluded counting as core capital any supervisory goodwill that was to be amortized over more than 20 years or in an amount exceeding 1.5 percent of total assets.

The court of appeals correctly held that at least by the conclusion of the enactment of FIRREA, the issuance of the implementing regulations, and OTS's notice of the application of the regulations to thrifts such as SoCal, there was no doubt that the government had prohibited what petitioners contend the government had promised to permit: the utilization of a specified amount of supervisory goodwill, amortized over 25 years, to meet regulatory capital requirements. Petitioners could have had no reasonable belief by that time that they could successfully demand the use of supervisory goodwill as they allege that they had been promised, and they were obligated by that time to conduct their business—and to respect federal regulatory capital requirements—without including supervisory goodwill. Consequently, the court of appeals did not err in holding that by the critical date (six years before they filed suit), there was not merely an intention to repudiate the contract terms; the breach, if any, had occurred.

3. In order to support the dating of the accrual of its claim at or after April 16, 1990, and thus to bring the claim within the six-year statute of limitations, petitioners focus upon OTS's April 18, 1990, approval of the capital restoration plan that SoCal submitted in January and amended in March of 1990. Pet. 5. Petitioners argue (Pet. 12) that FIRREA and the regulations did not immediately mandate non-performance of the alleged contract, because a provision of FIRREA, 12 U.S.C. 1464(t)(8), authorized OTS to grant individual institutions exceptions to the capital requirements. Petitioners, thus, argue that they were not damaged until OTS effectively denied SoCal an exception by imposing the restrictions contained in SoCal's capital restoration plan.

Petitioners' reliance upon FIRREA's exception provision is misplaced. First, as we have demonstrated, FIRREA and the OTS regulations imposed upon SoCal and other thrifts restrictions that conflicted with the alleged contract. Even assuming that SoCal would not have become subject to those restrictions if it had been granted an exception on the day the OTS regulations became effective, it was not granted any such exception. Indeed, implicit in petitioners' argument is the assumption that petitioners' thrift was not obligated to conduct its business in accordance with the law until OTS, the regulatory agency, threatened to (or in fact did) impose sanctions. Neither FIRREA nor any of its implementing regulations, however, could reasonably be read to include any such automatic temporary exception to the new capital requirements.[5]

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[5] It is possible, of course, that SoCal conducted business for some time after the effective date of the OTS regulations *as if* it had been granted an exception, and maintained a capital ratio that fell short of those mandated by FIRREA and the regulations. The fact that SoCal

Second, if SoCal had in fact been granted an exception at some point after the effective date of the regulations, that would only have mitigated the harm from the breach. As the CFC correctly observed, "[a]n exception might be relevant to the mitigation of damages, but does not neutralize the harm that was incurred from the moment of FIRREA's implementation." Pet. App. 32a.

Third, the exception provision permits the granting of exceptions only according to specific criteria, which principally concern the thrift's financial condition at the time OTS considers whether to grant the exception. See 12 U.S.C. 1464(t)(7)(C) & (t)(8). To qualify for an exception or an exemption, SoCal would have had to conduct its business in a manner justifying a determination that an exception "would pose no significant risk to the affected deposit insurance fund," and that there was no "pattern of consistent losses." 12 U.S.C. 1464(t)(7)(C)(i)(I), (ii)(I). The existence of a prior agreement concerning the utilization of goodwill would have no bearing on whether SoCal could have satisfied that test. Therefore, SoCal could not have conducted its business after the enactment of FIRREA upon the assumption that OTS would honor prior agreements by granting exceptions to the statute, and the possibility that SoCal could have obtained an exception on grounds unrelated to the alleged contract has no bearing on when petitioners' claim accrued.

4. Petitioners argue (Pet. 14-15) that the court of appeals' decision conflicts with the decisions in two other cases involving *Winstar*-type claims for breach of contract

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may have been able to continue operating in violation of legal requirements for some time, however, does not mean that those requirements were inapplicable to SoCal during that time. As SoCal's own contemporary actions demonstrated, the alleged right to utilize supervisory goodwill to meet capital requirements was infringed when FIRREA's goodwill provisions became effective.

for failure to permit the continued of supervisory goodwill to satisfy regulatory capital requirements—*Far West Fed. Bank* v. *OTS*, 119 F.3d 1358 (9th Cir. 1997), and *Resolution Trust Corp.* v. *FSLIC*, 25 F.3d 1493 (10th Cir. 1994). Petitioners argue that those cases stand for the proposition that "the Government's announced intention to enforce FIRREA's capital requirements against a thrift constituted anticipatory repudiation, not a breach." Pet. 14. Neither of the cited cases, however, had anything to do with the question of when the breach of contract claim accrued or with any other issue concerning the application of a statute of limitations, and neither decision conflicts with the Federal Circuit's decision in this case.

The court of appeals' statement in *Far West* that when "OTS announced its intention to impose FIRREA regulations on Far West, the government repudiated the Conversion Agreement," 119 F.3d at 1365, was made in response to an argument that the government had not, in fact, repudiated the agreement. *Ibid.* The court did not state or imply that a breach did not occur until OTS announced its intention to take enforcement measures against the thrift, and the court expressly noted that in a prior decision in the case it had "held that FIRREA did abrogate the [agreement]." 119 F.3d at 1363. Moreover, the *Far West* decision did not involve a statute of limitations claim, no issue in *Far West* turned on the date of the breach, and the facts in *Far West* differed from those in this case because of the intervention of a district court injunction that affected the enforcement of FIRREA.

Nor is there any conflict between the Tenth Circuit's decision in *Resolution Trust* and the decision in this case. The Tenth Circuit premised its rejection of the government's sovereign acts defense in *Resolution Trust* on the ground that, in the court's view, OTS retained discretion

even after FIRREA to exempt thrift institutions from sanctions for failure to meet the new regulatory capital requirements until January 1, 1991.[6] The court stated that, in light of that discretion, "OTS's refusal to abide by the contract's supervisory and regulatory goodwill terms constituted a breach of a contract term." 25 F.3d at 1502. The court, however, did not have before it any issue regarding the statute of limitations or the date on which a claim for breach of contract accrued. While its discussion indicated that it believed that OTS's refusal to exercise its discretion constituted a breach of contract, it did not in any sense address when that breach occurred—whether at the time OTS actually imposed sanctions or at some earlier date when the institution knew or should have known that it could no longer use its supervisory goodwill to satisfy regulatory capital requirements. Indeed, the court expressly disavowed any intention to resolve whether a breach had occurred at some earlier date. The court stated that, "[i]f we find * * * agency discretion [not to impose sanctions] here, we need not reach the issue of whether Congress breached these types of assistance agreements in enacting FIRREA." *Id.* at 1501. Because the court (mistakenly, in our view) found such discretion, it did not have to confront whether a breach had occurred upon the enactment or regulatory implementation of FIRREA.

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[6] In our view, the court erred in relying on 12 U.S.C. 1464(t)(8) to conclude that OTS had such broad-ranging discretion. As we note above, see p. 11, *supra*, although 12 U.S.C. 1464(t)(8) granted OTS discretion not to impose sanctions on "eligible savings associations," OTS could exercise that discretion only in carefully limited circumstances, none of which turned on the existence of an agreement regarding supervisory goodwill. See 12 U.S.C. 1464(t)(7)(C).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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